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Some Legal Considerations

In

Water Quality Management For Wildland Recreation

By

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Cover: Brock Tunnicliff guides U. of A. water quality research boat through Lava Falls on the Colorado River in Grand Canyon. (Photo by Stan Brickler.)

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Introduction

This paper discusses in a relatively few pages several subjects that could easily fill a number of large volumes. The purpose is to briefly introduce the law and then describe its role in the management of recreational water quality. Discussed topics include the three basic types of law in the American legal system (aside from the Constitution), specific examples of these types of law applicable to water quality management, and some legal tenets (or guidelines) to help the recreation manager function more confidently in the legal environment in which he or she must necessarily operate. The writing is done in a way that assumes the reader is only casually acquainted with the intricacies of the American legal system.

Different types of law which relate to recreational water quality management come from the three branches of government at the state and federal levels--legislative, executive, and judicial. The legislative branch makes statutory law. This is actual legislation which, for our purposes, directs a resource agency's general management policy and behavior, or which has more particular relevance to water quality management. The executive branch develops (or promulgates, in legal language) administrative law. This consists of codified and enforceable regulations which the various administrative agencies are empowered by legislation to establish. Then there is the judicial branch, from which comes case law. Case law is simply the aggregate of rules and principles of law found in the reported cases that are heard in courts of law. The courts function to (1) interpret law found in the state and federal constitutions, statutes, regulations, and previous court cases, and (2) apply that law, when applicable, to

the cases before them. State or federal court cases generally establish a legal precedent in the state or federal district, or federal circuit, in which they are heard.[1] A judgment handed down by the Supreme Court of the United States becomes a precedent for the entire nation.

The Example of the USDA Forest Service

In order to discuss statutory, administrative, and case law with some consistency in relation to management of recreational water quality, the USDA Forest Service (Forest Service) is used in this paper as an example agency. The general applicability of the law to be reviewed is similar for the Forest Service, National Park Service, Bureau of Land Management, Fish and Wildlife Service, and other federal and state agencies that have comparable recreation management responsibilities. Readers from non-Forest Service agencies will be able to analogize the subsequent thoughts and materials to their own circumstances.

The approach taken in selecting and presenting material in this paper is that of an attorney in the very early stages of having to prepare a court case for or against the Forest Service. In other words, we want to learn as much as we can about the relevant law in a short period of time, just as the attorney would have to do. The hypothetical case would, of course, involve the combined issues of recreation and water quality, with spillover into public health and

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[1] A precedent is a judgment or decision of a court considered as an authority for deciding a later similar case. Under the doctrine of stare decisis, decided cases which lay down a rule of law must be followed. The purpose is to maintain fairness and consistency in the law (Attorney's Pocket Dictionary 1981).

safety. At the statutory level we are interested in congressional assignment of general agency authority and responsibility to manage, as well as national policy pertinent to the issues of the case. Such statutes are always relevant to a court case against a federal land managment agency to determine if the agency was exercising its proper authority and meeting its basic responsibilities in relation to the facts of the case. In the area of administrative law we are looking for applicable regulations promulagated by the Secretary of Agriculture for the Forest Service, or by the Administrator of the Environmental Protection Agency (EPA), which set legal standards and responsibilities resulting ultimately from the legislative guidelines reviewed first. Last, under the subject of case law, the focus will be on the law of negligence. Of first concern here will be understanding the basic principles of negligence. The focus will then be on the types of duties this area of the law might identify the Forest Service as having with regard to protecting public health and safety in the management of recreational water.

The coverage of legal topics in this paper is by no means exhaustive. There is, however, sufficient material to provide the manager with a sound, basic understanding of the subjects discussed.

Statutory Law

Listed on the next several pages are two sets of chronologically presented statutes. Text accompanying the first set describes high-points of the listed acts which comprise the major congressional directives for the Forest Service. These few pieces of legislation establish the core of authority and responsibility of the Forest

Service to properly administer resources and activities (including water-related recreation) on the National Forests.

The second and larger set of named and described statutes represents federal water pollution control legislation, which began with passage of the Federal Water Pollution Control Act in 1948. The water pollution legislation passed before 1970 had no great substantive effect on federal agencies like the Forest Service. Nonetheless, this early legislation is important because it set the foundation and statutory tone for the powerful water pollution control amendments which began passing in the 1970s.

Forest Service Statutes

Organic Administration Act of 1897, 30 Stat. 34.[2] The basic authority and responsibility of the Forest Service to administer National Forest lands and resources, and their uses, lies with the Secretary of Agriculture. The Secretary's original authority rests in the Organic Administration Act, which was actually part of Section 1 of the Sundry Civil Expenses Appropriation Act for fiscal year 1898:

> The Secretary of Agriculture shall make provisions for the protection ... of ... the public forests ... and he may make such rules and regulations and establish such service as will insure

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[2]Legislation can be cited in three different ways. For example, the National Environmental Policy Act of 1969 is Public Law 91-190; 83 Stat. 852; or 43 U.S.C. sec. 4321. The first citation indicates that the Act was the 190th law passed by the 91st Congress. The second tells us that the Act is found in volume 83 of the United States Statutes at Large beginning on page 852. The final citation indicates that the law has been codified in volume 43 of the United States Code beginning at section 4321. Public Law and Statutes at Large citations appear in this paper.

the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests theron from destruction.[3]

Multiple Use-Sustained Yield Act of 1960, P. L. 86-517, 74 Stat. 215. Here, Congress firmly declared that the National Forests are established and should be administered for outdoor recreation and watershed (our present interests) as well as for timber, range, fish, and wildlife. The Secretary of Agriculture was further authorized to cooperate with state and local government agencies and others interested in management of the National Forests. This is the first significant legislation pertaining to the Forest Service which recognizes recreation as a legitimate and important use to be properly managed. Also, the Act can be cited in support of Forest Service cooperation with state water quality, health, and recreation agencies in the management of recreational water quality.

Forest and Rangeland Renewable Resources Planning Act of 1974, P. L. 93-378, 88 Stat. 476. In the Resources Planning Act (RPA), Congress did not have the intent of determining in advance what the major national policy for renewable resources specifically ought to be. Instead, the Act was designed to produce a "National Assessment" of the condition, use, and needs of renewable resources on our national forests and rangelands. Once the assessment was complete, a

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[3]The Forest Service, as agent for the Secretary of Agriculture, manages for, rather than in lieu of, the Congress. All Forest Service land management authority (and that of other federal land management agencies) is therefore grounded in authority granted Congress by Article IV, Sec. 3, Cl. 2 of the Constitution. "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This is commonly referred to as the Property Clause.

planning program was to be developed by the Forest Service with full public participation. The result of this program was to be a so-called common base for later budget requests and management actions. The RPA has much to say, but most germaine are statements pertaining to such topics as:

--inventory, evaluation, and improvement of renewable resources and services, including water and recreation;

--directives to make and keep "comprehensive" survey data on renewable resources to permit analysis of present and future resource conditions, and determination of management requirements;

--development, maintenance, and, when appropriate (for example, when new water resource data are available), revision of land and resource managment plans; and

--a requirement of administering renewable resources in full accord with the policies and principles of the Multiple-Use Sustained-Yield Act, including coordination of outdoor recreation with watershed, as well as with the five other multiple uses.

Significantly, the RPA states in Sec. 2 (6):

> The Forest Service ... has both a responsibility and an opportunity to be a leader in assuring that the Nation maintains a natural resource conservation posture that will meet the requirements of our people in perpetuity; ....

Because water quality management can be classified as a natural resource conservation activity, the above statement contains a mandate from Congress for the Forest Service to be a pacesetter in this and other areas of resource conservation.

National Forest Management Act of 1976, P. L. 94-588, 90 Stat. 2949. This was an unanticipated amendment to the RPA and resulted from the effects of some case law which served to interpret logging-related provisions of the Organic Administration Act of 1897.[4] Extreme Forest Service and industry concern over these cases brought about quick development and passage of the National Forest Management Act (NFMA) to (1) repeal the notorious section of the Organic Act at the root of the cases and (2) expand on and improve the resource planning directives of the RPA.

Much of the NFMA deals with timber sales, clearcutting, wood products, etc. But, it also deals with other relevant concerns of the RPA. The Act does several things:

--Reemphasizes the leadership role of the Forest Service in managing and conserving natural resources;

--Requires the Secretary of Agriculture to issue regulations setting out the process for development and revision of land (and water) management plans with guidelines and criteria for the protection, use, and development of the resources of the National Forest System;

--Requires that the above-mentioned regulations and guidelines be developed in accordance with the Multiple-Use Sustained-Yield Act and the National Environmental Policy Act of 1969;

--Recognizes the need to protect, and where appropriate, improve soil, water, and air resources;

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[4]See Izaak Walton League of America v. Butz (1975) and Zieske v. Butz (1975).

--Calls for the development of planning regulations which provide for obtaining inventory data on the various renewable resources such as water, and

--Requires specification of guidelines for land management plans which insure consideration of environmental aspects of various systems of renewable resource management, to provide for outdoor recreation, watershed (e.g., production of water of sufficient quantity and quality to serve all the multiple uses), range, timber, wildlife, and fish.

Water Pollution Control Statutes

The statutes listed below, which deal extensively with industrial and other point sources of pollution, may seem out of context. This legislation is nonetheless important for managers to be familiar with not only for its historical value, or because some of it has direct relevance to the issues of recreational water quality and non-point source pollution, but also because

(1) Existing state and federal programs for water quality standards and criteria (including those for recreation) are based on directives from this legislation;

(2) Future statutes which speak more directly to the topic of this paper will, in light of established legislative patterns, be based on current legislation; and

(3) The manager of recreational water quality is operating in an administrative environment and is communicating with state and federal agencies whose base of reference is this legislation, and the rules, regulations, and policies extending from it.

Federal Water Pollution Control Act of 1948, P. L. 80-845, 62 Stat. 1155. This was the first of what has become a long series of legislation passed by Congress to address water pollution problems in this country. As suggested earlier, the Act is not a powerful one, and a review of its policy statement today is a reminder of the great strength of the notion of states' rights less than 40 years ago.[5] Section 1 of the Act declared the policy of Congress was to "... recognize, preserve, and protect the primary responsibilities and rights of the States in controlling water pollution ...." Other intended purposes were to: support and aid technical research; devise and perfect methods of treatment of industrial wastes which are not susceptable to known methods; provide federal technical services to state and interstate agencies and industries; and to provide financial aid to state and interstate agencies and municipalities. The Surgeon General of the United States was designated the head of this new legislative plan of action.

Water Pollution Control Act Amendments of 1956, P. L. 84-660, 70 Stat. 499. This legislation amended the 1948 Federal Water Pollution Control Act (FWPCA) essentially by replacing it with new provisions designed to slightly advance and strengthen the Act. (The 1948 legislation was scheduled to terminate on 30 June 1956.) In the eight years following 1948, Congress recognized that the seriousness of the water pollution problem was increasing. In other words, relying so completely on the states to do the work was not getting the job done.

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[5]In fact, states' rights had a very strong influence on water pollution control legislation up to the end of the 1960s.

In the 1956 Act, Congress placed the first real water pollution control responsibility (although a weak one) on federal land management and other agencies by declaring in Section 9 that

> ... any Federal department or agency having jurisdiction over any building, installation, or other property shall, insofar as practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare, and with any State or interstate agency or municipality having jurisdiction over waters into which any matter is discharged from such property, in preventing or controlling the pollution of such waters.

Water Quality Act of 1965, P. L. 89-234, 79 Stat. 903.[6] Congress passed this amendment to the FWPCA for the purposes of: establishing the Federal Water Pollution Control Administration within the Department of Health, Education, and Welfare (HEW); providing additional grants for pollution abatement research and development programs; increasing grants for construction of municipal sewage treatment works; and requiring the establishment of water quality standards. Most significant, from the perspective of this paper, was the final purpose.

All states were to adopt, by June 1967, "... water quality criteria applicable to interstate waters ..." within their borders. Each state was, in addition, to develop a plan for implementation and enforcement of the water quality criteria. Should a state fail to adopt water quality criteria and/or fail to develop an implementation plan, it could not get FWPCA money and the Secretary of HEW was

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[6] The FWPCA was also amended in 1961 by P. L. 87-88, 75 Stat. 204. A key result of this Act was the vesting of FWPCA administration in the Secretary of Health, Education, and Welfare (rather than the Surgeon General).

authorized to go ahead and develop such criteria and plans for the delinquent state. Standards to be employed in the development of water quality criteria were not at all substantive, but the naming of any was a great advance over previous legislation.

Clean Water Restoration Act of 1966, P. L. 89-753, 80 Stat. 1246. By the time this amendment to the FWPCA had been passed, the Federal Water Pollution Control Administration had been transferred out of HEW and into the Department of the Interior. The Clean Rivers Restoration Program was the main emphasis of P. L. 89-753. Under this program the Secretary of the Interior was to encourage and help fund the development of river basin planning organizations (which interacted with the federal land management agencies) largely run by the states. These organizations were expected to develop comprehensive pollution control and abatement plans consistent with water quality standards established pursuant to the 1965 legislation. In addition, the states were to extend enforceable water quality standards to all waters within their boundaries (and not just interstate or navigable waters) if they wished to participate in the FWPCA grant and loan programs.

Water and Environmental Quality Improvement Act of 1970, P. L. 91-224, 84 Stat. 91. As recognized by the House Committee on Public Works, increasing research and technical information on water quality issues showed that previous FWPCA legislation had dealt inadequately with these issues. The 1970 amendments were another attempt to face up to the need for a much stronger federal role. Significant attention is given in the Act to oil pollution, authorizing federal designation of hazardous substances, increasing water quality research

and education programs, and controlling sewage from vessels. Most importantly, from a federal land managers viewpoint, the Act requires cooperation by all Federal agencies in the control of pollution.

> Sec. 21. (a) Each Federal agency (which term [as] used in this section includes Federal departments, agencies, and instrumentalities) having jurisdiction over any real property or facility ... shall, consistent with the paramount interests of the United States ... insure compliance with applicable water quality standards and the purposes of the Act in the administration of such property, facility, or activity.
>
> (b) (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters of the United States, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that there is reasonable assurance ... that such activity will be conducted in a manner which will not violate applicable water quality standards.

Federal Water Pollution Control Act Amendments of 1972, P. L. 92-500, 86 Stat. 816; and the Clean Water Act of 1977, P. L. 95-217, 91 Stat. 1566.[7] Including these two pieces of legislation, the FWPCA was amended approximately 20 times from 1972 to 1983. A majority of these amendments deal with appropriations extensions or minor text variations. The most comprehensive changes in and expansions of the FWPCA are to be found in the 1972 and 1977 Acts. However, at this writing Congress is considering legislation to "renew" the Clean Water Act which has been administered since 1982 under temporary budget resolutions. Some significant proposed amendments to the Act are being reviewed by both the House and the Senate.

Shortly after passage of the 1970 FWPCA amendments most observers realized that established standards for water quality criteria and

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[7]In compiling this final segment on statutory law, much has been borrowed from the helpful reference by Arbuckle, Frick, Ridgeway, et al. (1983).

enforcement, while having a substantial positive effect, were not as effective as intended. The time had come for a full federal commitment through yet another revision of the water pollution control statutes.

Late in 1972, Congress passed, over Nixon's veto, the FWPCA amendments which proved to be a sweeping revision of existing federal law. The new law established the solid federal-state regulatory framework which continues today as the cornerstone of enforcement. Still, the 1972 amendments, although effective, needed some bolstering. This was principally supplied by the Clean Water Act of 1977, while several other of the numerous post-1972 amendments also helped to some degree. These laws (or, rather, their relevant high-points) are reviewed here collectively as they read today. This is because, as amendments, they form one law which is hereafter referred to as the Act.

Sec. 101 states that the objective of the Act is to "... restore and maintain the chemical, physical and biological integrity of the nation's waters." To attain this objective, the Act sets two national goals. One is to achieve a level of water quality which "... provides for the protection and propagation of fish, shellfish, and wildlife and ... for recreation in and on the water ...." The other is "... that the discharge of pollutants into the navigable waters be eliminated by 1985." Unlike some earlier legislation, the objective and goals described here are not just rhetoric, but are significant guiding factors for the rest of the Act and the regulations and policies developed to implement it.

The principal mechanism for achieving the objective and goals of the Act is a system for imposing effluent limitations on, or otherwise preventing, discharges of pollutants into any "water of the United States" from any point source. The system includes:

(1) A discharge permit program (the National Pollutant Discharge Elimination System--NPDES) authorizing the Environmental Protection Agency to specify the limitations to be imposed on dischargers;

(2) A system of effluent limits establishing minimum treatment required;

(3) A program for imposing more stringent limits on obtaining discharge permits where such limits are necessary to achieve water quality standards or objectives;

(4) A set of specific provisions for special pollutants, e.g., oil, hazardous, and toxic wastes; and

(5) A grant program to fund publicly owned treatment works.

The scope of the NPDES permit program is exceedingly broad and the basic intent is to cover all pollutants discharged from all facilities into virtually all waters in the U.S. Operating procedures for the permit program can be found in the EPA's regulations and in the participating states' permitting regulations. Also, specific information on the setting of water quality standards can be found in EPA directives mentioned in the later section on administrative law.

The NPDES permit program is a means for regulating waste discharges from normal industrial or municipal processes. But, this system is not a useful method for controlling accidental or unanticipated discharges, or discharges which, by their nature, are not subject to confinement or treatment, e.g., area-wide runoff from

municipal, rural, or wildland settings. For this class of discharges the concern has to be with preventing accidental spills, or with minimizing the level of pollutants in area-wide (i.e., non-point) runoff. In recognition of these considerations, and of the fact that non-point source discharges are responsible for a large percentage of the total pollutants introduced into the nation's waterways, the Act provides other mechanisms to control discharges unrelated to industrial and municipal process wastes. We will direct our attention to one of these mechanisms--the planning program for non-point source pollution.

In section 208 of the Act is found the first congressional recognition of non-point source pollution. This section requires each state to identify areas which, due to various factors (such as expanding development), have substantial water quality control problems. For each of these designated areas representatives of state and local governments are identified and charged with the responsibility of developing a comprehensive area-wide plan for solving water quality control problems.

After several years, however, Congress halted funding for the 208 plans. As a result, slow advancement has been made under Section 208 since fiscal year 1980. Even so, some discussion of the program is warranted because (1) of its innovative, comprehensive approach, (2) many state and local governments have continued with their 208 programs, and (3) the large-scale 208 effort might be well revitalized at the national level.

Under 208, an EPA-approved planning organization is eligible for federal grants (when they are appropriated) to develop and implement a

comprehensive water quality planning program. Plans arising from 208 efforts must be consistent with the Act's other planning requirements (i.e., the 303 continuing planning process and the 201 waste treatment management plans) and are to provide an operable regulatory framework for dealing with important regional water quality issues.

For purposes of controlling non-point source pollution, a plan must include a process to identify sources of non-point pollution. These sources could include agricultural and silvicultural activities, surface or underground mine runoff, construction activity of numerous kinds, landfill operations, and irrigation, to name a few. With regard to identified sources, the plan must also include control measures such as management practices and land use requirements to minimize each activity's pollution potential. The control requirements developed under 208 may be enforced by the designated planning agency or the Governor of the state.

This brings to an end the segment on water pollution control statutes. Despite all the discussion, we have really only scratched the surface of the FWPCA and related legislation as they exist today. There is, however, one additional piece of relevant legislation with which the reader should be acquainted before considering the subsequent section on administrative law.

Safe Drinking Water Act of 1974, P. L. 93-523, 88 Stat. 1660. The purpose of this act is to assure that all water supply systems serving the public meet minimum national standards for protection of public health. The states have primary enforcement responsibility under the act and have been authorized to establish necessary standards equal to or more stringent than those developed by the EPA.

The act clearly states that each federal agency having control over public water systems (e.g., those in recreation areas) must comply with all federal, state, and local requirements and administrative authorities respecting the provision of safe drinking water.

Administrative Law

Retaining the attorney's perspective described earlier, we move on to review administrative law pertinent to the previously named subjects of interest, i.e., recreation, public health and safety, and water quality. We begin with the EPA rules established to advance the purposes of the FWPCA, as amended, consider EPA regulations for drinking water, and then turn to Forest Service regulations. But first we will briefly review the federal documents in which administrative law is found.

The administrative laws (or regulations) of most executive departments and agencies of the federal government are published in the Federal Register. (They are later republished in the Code of Federal Regulations (C.F.R.) under appropriate agency and subject headings.) The Federal Register is the government's equivalent of the public notices section of a newspaper. It serves the legal purpose of putting the public on notice concerning various administrative changes in our government. The legal status of the Federal Register is that its regulatory contents are recognized by Congress as having the force and effect of law.

EPA Regulations

Rules promulgated by the EPA are found in Title 40 C.F.R. The nine-volume set that constitutes this title consists of thousands of

pages of codified "Parts." We are concentrating on a relatively small number of rules in the volume containing Parts 100 to 149, i.e., those dealing with the FWPCA, as amended, and the Safe Drinking Water Act.

Those parts, or sections thereof, with at least some relevance to recreation-related water use of the general type occurring on National Forest lands are described below. At first glance, some readers (with a federal perspective) who are just being introduced to water quality managment may not see the applicability of these rules because of the heavy orientation toward states. The tie-in will become quite clear, especially after presentation of the Forest Service portion of this section.

On 8 November 1983, the EPA published a new Part 131 (48 Fed. Reg. 51405) which now appears in 40 C.F.R. 131. This regulation represents a revision and consolidation of Parts 35 and 120 which governed the development, review, revision, and approval of water quality standards under Section 303 of the FWPCA as amended. (From now on the FWPCA will be referred to as the Clean Water Act because this is how it is now commonly addressed.) The older Parts 35 and 120 have been removed from the C.F.R. The new Part 131 was developed to reflect knowledge gained by both the EPA and the states. Part 131 is more explicit in describing what is expected of the states for water quality standards reviews. The regulation also makes clear that in promulgating federal standards for a particular state (which occurs when a state fails to establish its own), the EPA is subject to the same requirements as the states. Because of the great importance of Part 131 (i.e. it is now the central reference for developing water quality standards nationwide), its sections on scope and purpose are

reproduced below. The reader is strongly encouraged to locate and read the complete text of the regulation.[8]

PART 131 — WATER QUALITY STANDARDS

Subpart A -- General Provisions

Sec. 131.1 Scope.

> This part describes the requirements and procedures for developing, reviewing, revising and approving water quality standards by the States as authorized by Section 303(c) of the Clean Water Act.

Sec. 131.2 Purpose

> A quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses. States adopt water quality standards to protect public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act (the Act). "Serve the purposes of the Act" (as defined in Section 101(a)(2) and 303(c) of the Act) means that water quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial, and other purposes including navigation.
>
> Such standards serve the dual purposes of establishing the water quality goals for a specific water body and serve as the regulatory basis for the establishment of water quality-based treatment controls and strategies beyond the technology-based levels of treatment required by section 301(b) and 306 of the Act.

Since 1973 the EPA has periodically issued ambient water quality criteria to which the states have referred when establishing their water quality standards. The documents containing these criteria and

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[8]There is a companion document to Part 131 which should be considered indispensible to the serious water quality manager. It is named Water Quality Standards Handbook and was published by the EPA just after the new regulations appeared in the Federal Register (Environmental Protection Agency 1983a).

related material references are (1) the "Blue Book", Water Quality Criteria 1972, (2) the "Red Book", Quality Criteria for Water 1976, (3) 45 Fed. Reg. 79318 (28 November 1980) concerning individual criteria for 64 toxic pollutants, and (4) 49 Fed. Reg. 5831 (15 February 1984) concerning dioxin. At this writing the EPA is considering new bacteriological water quality criteria for fresh and saltwater swimming areas. See 49 Fed. Reg. 21987 (24 May 1984).

State Certification of Activities Requiring a Federal License or Permit -- 40 C.F.R. 121. This topic was discussed earlier under the heading of Water and Environmental Quality Improvement Act of 1970. The EPA published the series of regulations in Part 121 to carry out the purposes of Sections 21(a) and (b) of the 1970 Act. (See also, Sec. 313 (a) (Federal Facilities Pollution Control) of the Clean Water Act.) Obviously, some recreation-related permits issued to users of the federal lands would come under the authority of this subpart, e.g., a special use permit for a ski area or other recreation facility or activity. This is especially clear when reading the Act's definition of a license or permit in Section 121.1 (a) which states that these words mean "... any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into the navigable waters of the United States." (The term "navigable waters" has been expanded by Congress, the courts, and the agencies, far beyond its original meaning when applied to the issue of water pollution, e.g., intrastate waters are included to more effectively control pollution.) The bottom line is that if the permit applicant's project is not certified by the authorized state agency as having "... a reasonable assurance that the activity will be conducted

in a manner which will not violate applicable water quality standards ..." the permit must be denied. The certifying agency is simply the person or agency designated by the governor of a state, by statute, or by other governmental act, to certify compliance with established standards.

National Pollutant Discharge Elimination System -- 40 C.F.R. 122. The NPDES program requires the obtaining of permits for discharge of pollutants from any point source into the "waters of the United States."[9] This latter term literally means all waters. Its definition, appearing in 40 C.F.R. 122.2, even includes intermittent streams, wetlands, sloughs, prairie potholes, mudflats, etc.

The NPDES is the major program for controlling point source pollution on a national scale. The states and the EPA are continously involved with the program, and there are occasionally times when the Forest Service and other land management agencies are involved.

Interestingly, there is a small section of the NPDES regulations relating to certain aspects of logging operations. Readers with timber management responsibilities should review 40 C.F.R. 122.27 and 123.25.

National Interim Primary Drinking Water Regulations -- 40 C.F.R. 141. The NIPDWRs were written pursuant to the Safe Drinking Water Act of 1974. There are five subparts to these important regulations, the

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[9]Pollutant (under the NPDES) means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, some radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste (40 C.F.R. 122.2).

first of which (Subpart A) addresses the topics of applicability of the regulations, definitions of terms, coverage (i.e., the types of water systems affected), water system siting requirements, and the effective dates of the regulations. Subpart B is concerned with maximum contaminant levels for drinking water. Categories of contaminants include inorganic and organic chemicals, turbidity, microbiological contaminants, and radioactivity. Monitoring requirements for these several contaminants are discussed in Subpart C. Reporting, public notification, and recordkeeping rules are presented in Subpart D, and special directives for monitoring organic chemicals and unregulated contaminants are given in the final segment, Subpart E, of the NIPDWRs. Although somewhat technical in nature, these regulations merit at least a general review by land managers because of their nationwide applicability.

Forest Service Regulations

Title 36 C.F.R. Part 200 is where administrative law for the Forest Service is to be found. Of interest here are statements of authority and responsibility, and how directives from the legislation and EPA regulations reviewed thus far are manifest, or may be accomodated, in Forest Service regulations. In this final segment on administrative law, after finishing with the C.F.R., we will review relevant Forest Service policy (not regulations) appearing in the Forest Service Manual (FSM, or Manual). This is done for two reasons; first, the FSM gives managers explicit directions which result from legislative and C.F.R. mandates, and, second, some FSM policies will have relevance to case law.

Under Part 200, Subpart B, general functions and procedures of the Forest Service are spelled out. Memories of the RPA and NFMA arise when the statement is read wherein the Forest Service provides "overall leadership" in forest and forest-range conservation. This is a significant responsibility when combined with later statements in Subpart B such as "... watersheds are managed to safeguard the water ..., recreation resources are managed for public enjoyment and benefit ...," and "The Forest Service conducts research on problems involving protection ... of all resources, products, values, and services of forest lands ...." In other words, it is not enough for the Forest Service to keep pace with other agencies. There apparently is a legislative and regulatory requirement to be on the leading edge in recreational water quality and additional areas of forest resource management, as compared to the other federal land management agencies.

Major attention must be directed to Part 219--Planning--because, as regulations declare, plans guide all natural resource management activities and establish management standards and guidelines for the National Forest System. Forest planning is to be based on a number of important principles which include:

--Establishment of goals and objectives for multiple-use and sustained-yield management of renewable resources without impairment of the productivity of the land, water, and related resources;

--Protection and, where appropriate, improvement of the quality of water and other renewable resources;

--Provision for the safe use and enjoyment of the forest resources by the public;

--Coordination with the resource planning efforts of other federal, state, and local agencies, and Indian tribes;

--Establishment of quantitative and qualitative standards and guidelines for land, water, and other resource planning and management; and

--Responsiveness to changing conditions of land, water, and other resources.

Specific requirements for the preparation, revision, or significant amendment of forest plans are given under Part 219 beginning at Section 219.12, and titled **Forest planning process.** A major effort in the process is preparation of criteria to guide planning. Criteria may be derived from a number of sources including, but not limited to: laws, such as those reviewed earlier; executive orders from the President; regulations from the C.F.R.; and agency policy as set forth in the FSM, which is considered later. In addition, the plans and programs of other federal and state agencies (e.g., state departments of water resources), and local governments may be sources of planning criteria. Some additional key aspects of the planning process are identification of planning purposes and needs, collection of current and future inventory data on resources (e.g., water and recreation resources), and analysis of existing management situations. The latter activity is necessary to determine the ability of forest areas being planned for to supply goods or services, like water-based recreation, in response to user demand.

Recreation and water are given specific attention in C.F.R. Sections 219.21 and 219.23. Forest planning for recreation is to identify, among other things, the physical and biological characteristics that make areas suitable for recreation opportunities,

along with the recreation preferences of user groups and the settings needed to provide quality recreation opportunities. Forest planning for water resources is to provide for estimates of current uses, both consumptive and non-consumptive. Water planning shall also provide for

> Compliance with requirements of the Clean Water Act, the Safe Drinking Water Act, and all substantive and procedural requirements of Federal, State, and local governmental bodies with respect to the provision of public water systems and the disposal of waste water; [and]
>
> Evaluation of existing or potential watershed conditions that will influence ... water yield, water pollution or hazardous events.

Forest Service Manual

Procedures for the conduct of Forest Service activities are issued as directives from the Chief's Office, located in Washington D.C. These directives are systemetized in the previously mentioned Forest Service Manual; a highly organized, multi-volume set which is supplemented by Regional Foresters and Forest Supervisors, when appropriate. There is also a system of Forest Service Handbooks. These address special topics and further define procedures to be followed. Other directives not "posted" in the Manual frequently appear in the form of unpublished correspondence or circulating memoranda.

Our interest at this point is the FSM, and not the handbooks or intra-agency memoranda. Attention is given almost exclusively to two major segments of the manual; Title 2300 - Recreation Management, and Title 2500 - Watershed Management. Right away, the reader should understand that policy appearing in the FSM is not administrative law. Laws and regulations may be referenced, quoted, and discussed in the

Manual, but, unlike the C.F.R., Congress has not recognized the FSM as having the force and effect of law. (Directives appearing in the FSM are, of course, mandatory for Forest Service managers.) The purposes in reviewing the Manual are to (1) examine where and how the Forest Service implements the applicable statutory and administrative law discussed earlier and (2) identify specific duties the Forest Service recognizes itself as having under the topics of recreation, health and safety, and water quality management. (This will apply directly to the following section on case law.)

Selected FSM sections are reproduced below in numbered order as they appear in the Manual. Brief comments accompany some quoted material to elucidate points where deemed appropriate. (Manual directives quoted in this paper were obtained from the Supervisor's Office, Coronado National Forest, Tucson, Arizona. They are up to date as of 10 January 1984.)

TITLE 2300 --RECREATION MANAGEMENT

2303 - POLICIES. Recreation use and development on the National Forest System will be governed by these basic policies:

3. Safeguarding public health and safety and protection of natural forest resources will be of first importance at all public-use areas developed by the Forest Service or constructed under special-use permit. To that end, emphasis will be given to satisfactory sanitary facilities, safe water supplies, fire prevention, erosion control, pollution prevention, hazard eliminations, and area protection.

316.15- Public Health and Safety Agencies. It will be Forest Service policy to comply with all applicable State, county, and municipal laws in administering recreation areas and special-use permits involving recreation. Particularly with regard to public health and safety, such laws will be considered minimum requirements and will not preclude the application of more stringent regulations as necessary.

This type of language places a substantial responsibility on the Forest Service regarding public health and safety considerations beyond those which might be required by legislation or regulations.

> 2323.4 - **Water ....** It is not possible to assume that potable water will always be available in wilderness though this assumption is widespread. The user should be made aware and educated to take measures that will afford him safe water.

A statement such as this establishes a duty to warn wilderness users of potential water quality hazards, e.g., enteric pathogens.

> 2333.2 - **Public Safety.** To the extent practicable, the Forest Service should eliminate all known safety hazards from recreation sites.
>
> No site shall be made available to the public until the safety and sanitation aspects have been fully inspected, unsafe conditions recorded, and corrective action taken ....
>
> **2333.4 - Sanitary Facilities.** Vaults, septic tanks, and other waste-water systems will be inspected at regularly scheduled intervals to see that capacities are not exceeded and that the system is functioning as intended.
>
> **2335.2 - Swimming Sites.** In areas where swimming use is very limited, with only occasional swimmers, special measures are not ordinarily needed or feasible. As swimming use increases significantly, Forest Supervisors should make an evaluation to determine the need for improved swimming area management and/or development.

If the Forest Service is aware, or should be aware, of swimming activity occuring in an inappropriate or unsafe place, some type of direct management response is called for.

> 2335.2 - **Administration.** Swimming sites will be made as safe as practicable for vistor use through good design, maintenance, and administration.

TITLE 2500 - WATERSHED MANAGEMENT

ZERO CODE

> It is essential to apply good watershed management to all areas regardless of climate, topography, or their local condition .... Good watershed management is manifested by stable soils and orderly streamflow of sufficient quality to meet the public's needs.

These two sentences correlate developed and backcountry areas (i.e., "all areas"), with the concepts of good watershed management and water quality.

> 2502 - **OBJECTIVE.** The objective of watershed management ... is the protection and, where appropriate, the enhancement of soil productivity, water quality and quantity, and timing of water yield.

This requires:

> 3. Establishing soil and water standards for National Forest System lands that will best meet present and future needs.
>
> 4. Cooperating with other appropriate Federal, State, city, and county agencies responsible for soil, water, and environmental goals.
>
> 5. Monitoring and evaluating agency activities on a continuing basis to protect and enhance soil and water resources and environmental quality.
>
> 2503 - **POLICIES.** Watershed management activities on the National Forests will be in accordance with the general objectives of multiple use and the specific objectives in the Forest land management plan for the area involved and will be coordinated with all other uses and activities. All watershed protection and management activities will be planned and administered with safeguards needed to attain the optimum range of beneficial uses without degradation of the environment, risk to health or safety, or other undesirable consequences.

The Forest land management plan for any Forest in question would have to be consulted when considering specific legal issues pertaining to a particular water quality problem.

2504 - **RESPONSIBILITIES**

2504.2 **Regional Forester.**

Specifically, responsibility is delegated by the Chief to the Regional Forester to:

13. Cooperate at State and Regional levels with Federal and State agencies, such as the ... Environmental Protection Agency, ... Public Health Service, ... State water resource boards, and State pollution control organizations in management and use of soil and water resource programs and permits related to National Forest System lands.

This single quote alludes to a number of subjects discussed in the statutes and regulations reviewed previously, e.g., state cooperation, EPA regulations, permit certification, federal agency participation, and so on.

2525 - **MONITORING.** Monitoring of appropriate factors, such as soil, water, ... and watershed conditions provide the means for assessing, on a continuing basis, the degree to which planning, management, operation, and maintenance of renewable resources meet applicable goals and standards.

Monitoring is an essential part of management as reflected in congressional and Executive mandates.

2525.03 - **Policy.** Each National Forest shall maintain a watershed monitoring effort.

Water quality monitoring for recreation purposes is analogous to inspection for more visible hazards. The need and requirement for this class of monitoring are unavoidable.

2540 - **WATER QUALITY MANAGEMENT.**

2542.02 - **Objective.** The objective of Forest Service water quality management is to protect and, where needed, improve the physical, chemical, bacteriological, biological, and aesthetic quality of the water resource in a manner which is consistent with the purposes of the National Forests and the Nation's water quality goals.

This objective (and related text) brings to bear the Forest Service and Clean Water Act statutes, and Forest Service and EPA regulations. The following quotation on Water Quality Standards is but one cogent example of official policy.

2542.3 - Water Quality Standards

1. **Review.** The Forest Service will participate in the review and revision of State or Federal water quality standards.

2563 - COOPERATION IN OTHER WATER-RELATED ACTIVITIES

2563.1 - **Pollution Control.** Water quality management planning and implementation efforts of State and areawide water quality management agencies and the Forest Service must be fully coordinated.

Where National Forest System lands are significantly involved, the Forest coordinator should participate directly with the State or local water quality management agency in all levels of the 208 planning effort.

2563.11 - State and Areawide Water Quality Management. The Forest Service and the Environmental Protection Agency have issued a joint policy statement to provide the basic framework for cooperation among the Forest Service, the Environmental Protection Agency, and the State and areawide water quality management planning agencies. This policy statement (April 2, 1976) spells out the coordination necessary for planning of water pollution control and the subsequent implementation of these plans necessary to meet the requirements of section 208 of Public Law 92-500 (FSM 2110.3).

The above information verifies a strong commitment on the part of the Forest Service to the 208 planning program and its purposes of controlling area-wide or non-point source pollution. Even though Congress has chosen not to fully fund the program in recent years, the Forest Service has a policy of continuing to work toward achievement of the program's objective.

7421 - **POTABLE WATER**

1. **Definition.** Any water offered as intended for human use, whether for drinking, cooking, or washing, is considered potable.

To furnish water by any means of development that indicates physical protection is given by design and construction features must be considered as evidence of intent of human use.

3. **Unprotected.** Water sources in areas where compliance with NIPDWR, State regulations and manual standards is physically impossible [that is, wilderness areas and cross-country trails, etc.] must be maintained in an undeveloped condition that clearly indicates the water source is unprotected.

NIPDWR is the acronym for National Interim Primary Drinking Water Regulations established by the EPA.

4. **Warnings.** When providing the public with information about these water sources through trail guides, brochures, or maps, a warning statement as to potability of the water must be included. Any modifications to these unprotected sources must be limited so as not to mislead users into thinking the water is protected and safe.

The three policy statements presented above on potable water are important because they deal with the topic of water that will potentially be ingested by the public. The statement numbered "4" is of particular significance because of its mention of a duty to warn backcountry users. This is one of the issues to be considered in the law of negligence, which, again, is the central topic of the section on case law. Before getting into case law, however, a brief review of major materials covered to this point is needed.

Interim Summary

All aspects of the system of American law are inextricably anchored to the Constitution. That document is a legal instrument given life not by Congress, the courts, or the states, but by the people, individually and collectively. We saw in the Property Clause (quoted in footnote 3) how the Constitution vests Congress with authority over the property of the United States. This authority is

the cornerstone upon which rests such statutory law as the Organic Act of 1897, the RPA of 1974, and the NFMA of 1976. Other enumerated powers (or powers specifically mentioned in the Constitution, e.g., the Commerce Clause) are the authority behind the FWPCA and its amendments, which, as stated earlier, are now known as the Clean Water Act.

Through various statutes, the Department of Agriculture and the EPA have been delegated some authority by Congress, which these agencies apply through the establishment of administrative law, i.e., regulations. And, with regard to the Forest Service, the purposes and objectives of the statutes and regulations are then internalized by the development of intra-agency policy which appears in the form of the Forest Service Manual and related documents.

Thus, we see that (1) Congress is empowered by the Constitution, and interprets it when passing statutes, (2) the land management agencies are empowered by statutes and, in turn, interpret them when establishing administrative law, and (3) agencies like the Forest Service interpret regulations, as well as statutes, when developing management policies like those appearing in the Forest Service Manual.

The courts are unique in that they consider and rule on all of the above. Technically, the courts do not make law, they merely interpret, clarify, or apply its meaning to the facts of a case. When dealing with issues bearing directly on statutes or regulations, their primary focus will be the texts of such legal documents. When considering issues (such as negligence and other torts)[10] for which

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[10]A specific definition of torts is difficult to give. However, one that is reasonably good is that torts are injuries to persons or property, independent of a contract, for which there are civil

very few judicial rules have been established by legislative bodies, and none have been promulgated by regulatory agencies, the courts look to case law, or precedents (as mentioned at the beginning of the paper), established by previously heard and recorded cases involving comparable facts.

Case Law

The Federal Court System

The federal court system consists primarily of three different levels--the U.S. District Courts, the U.S. Courts of Appeals, and the U.S. Supreme Court. (There are also the special courts, which include the U.S. Court of Customs and Patent Appeals, the U.S. Court of Claims, and the U.S. Tax Court.) Each state forms a minimum of one federal judicial district; the larger, more populous states include two or more. At least one judge is assigned to each district. District courts are the trial courts of the system, i.e., they make use of juries, hear witnesses, and accept evidence.

District court judgments, when they are appealed, are reviewed by one of the U.S. Courts of Appeals. There are now 11 Courts of Appeals; each with its own geographical "circuit." These are not trial courts; they do not empanel juries, hear testimony, or review physical evidence. They confine their considerations to trial court (e.g., District Court) records, and lawyers' briefs and summations.

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remedies. Torts include negligence, assault, battery, false imprisonment, trespass to land, trespass to chattels (personal property), infliction of mental distress, nuisances, injury from unsafe products, and defamation, to name some of the more common ones. A water quality-related tort action would most likely accuse a manager of misfeasance (taking improper action) or non-feasance (taking no action when it was required by statute, regulation, agency policy, or ordinary prudence) concerning a water quality hazard which caused someone an injury or illness.

The Courts' of Appeals decisions are final, except to the extent the Supreme Court chooses to hear appeals from them.

The Supreme Court of the United States is the only court specifically created by the Constituion (the others were established by Congress). It is the final authority in any case involving any question arising under any provision of the Constitution, an Act of Congress, or a treaty of the United States.

The Law of Negligence and Managers' Responsibilities

The rules, tenets, and precedents discussed below have broad applicability to the Forest Service, as well as the Park Service, Bureau of Land Management, Fish and Wildlife Service, and other federal agencies with similar recreation management responsibilities. These agencies formally recognize and promote recreation on most of the hundreds of millions of acres under their collective jurisdictions. Relevant Forest Service statutes, regulations, and FSM policy statements appearing in this paper are an excellent example of this. But, what about the "on-the-ground" manager (the district ranger and his staff, for example) who has daily contact with the public and who is directly charged with promoting recreation, and at the same time held to some unclear level of responsibility for public health and safety? What about his or her concerns for a lawsuit, and what basic principles do courts recognize as acceptable guidelines for recreation management behavior pertaining to public health and safety? Answers to these questions can only be formulated through an understanding of the law of negligence.

To successfully maintain a cause of action in negligence against a resource manager and/or his agency, the plaintiff (i.e., the person

bringing the suit) must show that his or her complaint embraces the four essential elements of a negligence action.[11] These have been well-defined by Prosser (1971) and are presented below, as adapted to the manager's point of view.

(1) A legal duty or obligation must be identified which requires the manager (or employee) to conform to a certain standard of conduct, or level of management, to protect the recreation participant against unreasonable risks.

(2) There must be a failure on the part of the manager to conform to the standard required. This failure is sometimes called a "breach of duty."

(3) There must be a reasonably close connection between the action (or inaction) of the manager and the resulting injury or illness to the recreation participant, i.e., the manager's action must be a proximate cause of the plaintiff's injury or illness.

(4) There must be actual loss or damage resulting to the interest of the participant. It is not enough that the individual was potentially in danger, or that the manager's act, his failure to act, or the hazardous condition he allowed to exist caused an accident or unhealthy condition which injured no one.

To determine whether or not a particular duty to protect the recreation vistor exists, the courts will focus on two general

[11] A manager can be held personally liable for his negligence. Normally, the agency, and not the manager, will be the one that ends up paying any judgments, should the case be lost. This is because (1) the manager is generally "judgment proof" (i.e., he doesn't have enough money to bother with), and (2) he is functioning as the agent of his employing agency which is responsible for most of his management actions. After paying a judgment resulting from an employee's negligence, an agency has a right to recover from the employee what it has paid. However, the tradition with government agencies is to not recover a judgment from an employee unless the employee was grossly negligent, which is a rare occurrence.

criteria: the language of the agency mandate (statutory or administrative law, or agency policy, which may impose a duty on the agency/manager to take positive action to protect the public user), and the duty inherent in the situation in which an agency conducts its recreation management operations. If the responsibilities are clearly spelled out in the law or agency policies then the court will have no difficulty in finding that a "duty" exists. If the obligation is less clearly defined, the responsibilities of the agency to protect the vistor become dependent upon vagaries of the common law (legal custom) or interpretations of previous similar cases.

The Forest Service legislation discussed in the statutory law section of the paper mentions recreation and its importance as one of the multiple uses; but, there are no specifics on public safety. There is, however, the mandate to include recreation in the Forest-wide planning process.

More is offered in the regulations, such as 36 C.F.R. 219, in which we saw the requirement that Forest planning make "provision for the safe use and enjoyment of forest resources by the public." Considering this directive with others in Part 219 and elsewhere (like the ones requiring protection and improvement of water quality, and those calling for compliance with the Clean Water Act, the Safe Drinking Water Act, and state and federal regulations and water quality programs), one begins to get a better picture of the types of legal duties a Forest Service manager with recreational water quality responsibilities might have.

An agency, when developing policies and procedures, will often establish additional duties for itself with regard to the recreation visitor. Recall from Title 2300 - RECREATION MANAGEMENT of the FSM,

one of the objectives was to emphasize "... promoting user safety." Under Title 2500 - WATERSHED MANAGEMENT- are statements to do such things as "monitor" water quality, identify "water-related hazards," and improve, where needed, "... the physical, chemical, bacteriological, biological, and aesthetic quality of the water resource ...." Also, under FSM 7421, the manager is directed to warn backcountry users of the possible hazards of drinking natural waters.

For the Forest Service manager, because of the cardinal function that planning is now taking on, he or she will need to refer to Forest and special area plans for further information on recreation management responsibilities (or duties) established by the agency. As just one example, given below is an excerpt from a special area plan for the Glacier Peak Wilderness (which would be treated as an addendum to the plans for the three National Forests on which the wilderness is located). Our ficticious attorney would most likely be looking for the language on cautioning people, if he is trying to develop a lawsuit against the government for a water quality-related injury or illness to a client who visited the area. The attorney could combine this with the directive in FSM 7421, discussed in the above paragraph.

> Personal risks associated with adverse weather conditions, isolation, physical hazards, and lack of rapid communication and travel are inherent in a visit to wilderness .... Patrolmen will caution people of the hazards through direct contact and handouts. [U.S. Forest Service 1976.]

The Forest Service and other land management agencies operate under the somewhat protective rules of the Federal Tort Claims Act of 1946. This Act establishes the liability of the federal government

for damages caused by the negligence of an employee who is acting within the scope of his or her employment.[12]

Under the Federal Tort Claims Act (and an increasing number of similar state statutes), a sharp distinction is made between general discretionary management decisions from which no liability may arise, and ministerial functions which may result in liability if carried out negligently.

Although the battle over whether management activity is ministerial or discretionary constantly is being waged in the courts, the cases are of little predictive help to resource managers. Once the basic decisions have been made on whether to establish a recreation site, a wilderness, a trail, a facility of some kind, or even a national park or National Forest, almost any management activity may arguably be ministerial.[13]

Described on this and the next few pages are some selected rules of tort law derived from a review of federal court cases dealing with general negligence actions against the Forest Service, the Park Service, the Bureau of Land Management, and the Fish and Wildlife

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[12]The Federal Tort Claims Act has relevance to the doctrine of sovereign immunity. This is a principal of jurisprudence whereby the government cannot be sued unless it has given its consent or has otherwise waived its exemption from suit. Sovereign immunity is founded on the ancient English principle that the King can do no wrong. Our government inherited this "right" from England when we declared independence. The Federal Tort Claims Act helps citizens surmount this obstacle to recovery for injury, but in a circumscribed way.

[13]The tort claims act requires that the rules of law applied to a case brought under the Act are to be those of the state in which the alleged tort occurred. So, the federal court will consider state law when rendering its decision.

Service in their capacities as recreation management agencies.[14] The value of these rules is that they can be considered generally applicable to negligence actions that might arise in relation to recreational water quality and other aspects of recreation management.

--Land management agencies are liable in tort claims actions (e.g., negligence) to the same extent and in the same manner as private individuals would be;

--The law of the state where the alleged negligence occurred must be applied in tort claims actions to determine whether liability exists;

--Recreation visitors are considered public invitees. An invitee is one who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.

--Land management agencies owe to public invitees the duty of exercising reasonable care under the circumstances to keep the premises in a reasonably safe condition;

--Land management agencies are not required to ensure that the premises are absolutely safe;

--There is no duty for the land manager to warn an invitee of visible and obvious hazards.

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[14]The courts will generally require a complainant to exhaust all administrative remedies available to him before he will be permitted to sue in court. Thus, administrative claims will almost always have to be filed with the agencies, and ruled upon, before a suit can be successfully filed.

--A public invitee has a duty to exercise reasonable care for his/her own safety and beware of patent (or obvious) conditions.

There are three variables (associated with negligence cases which might be brought against land management agencies) that can serve to protect agencies from excessive liability: (1) deference given by the courts to discretionary activity of an agency; (2) a legal defense called "assumption of risk" on the part of the recreation visitor; and (3) the natural or unaltered characteristic of the land resource itself.

The reasoning behind the courts' allowance of a great deal of leeway in land managers' exercising of discretionary authority is logical and straightforward. The courts simply do not want to have to take over responsibility for managing the federal lands; it is not their job and they are not trained for it, as the managers are.

The premise upon which an assumption of risk defense rests is that individuals are responsible for their own behavior. If they do something foolish which results in their own injury, they should not be able to place the blame on another party or to recover for losses. The lawyers say volenti non fit injuria--no harm is done to one who consents. In defining assumption of risk, the negligence case of Barth v. Barth (1977) says

> It means voluntarily incurring the risk of an accident, which may not occur, and which the person assuming the risk may be careful to avoid; it defeats recovery because it is a previous abandonment of the right to complain if an accident occurs.

Generally the risks to backcountry recreation users, for example, would be apparent to the average "reasonable person." This is the qualitative standard courts use to judge the reasonableness of an

individual's behavior. If the risk is not apparent, the agency should point it out, whether the hazard be in the backcountry or at a developed site. This allows the visitor to make informed decisions on assuming a risk. Managers should realize that as more and more states move toward some form of comparative negligence (comparing the proportionate amount of wrongdoing of the injured party to that of the agency, and awarding damages to the plaintiff accordingly), the assumption of risk doctrine can be altered or "watered down" as a defense.

The third variable which may affect agency liability involves the inherent characteristics of the land resource. When doing legal research in this area, one finds an absence of reported cases of successful litigation arising from backcountry recreation activities (including backpacking, river running, rock climbing, cross-country skiing, and others) that take place in unaltered, natural environments and are not dependent on mechanization or site development. The way in which tort law has evolved has resulted in the irony that the more a property owner or resource manager does (with regard to construction or developments) to make an area safe or attractive, the more likely he or she is to be responsible if the area turns out to be unsafe. For example, if the agency builds wooden steps up to a lookout point and fails to keep them safe for use, the agency is more likely to be held responsible for a resultant injury than if the area had been left in its natural, unaltered state. The same is true for water recreation areas. A designated and developed swimming site is much more likely to generate litigation from a mishap or acquired illness

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in a particular water body have greatly exceeded primary contact standards, or that there has been a rockslide, or that the bridge footings are rotten. There must be an action plan for dealing with these circumstances. A commitment to hold an area open for public recreation activities must also be a commitment to monitor, maintain, and manage the area at a safe and acceptable level.

Update

Although the Clean Water Act came up for renewal in 1984, Congress let the year end without any action being taken. Thus, the Act is now in limbo. Nonetheless, the EPA has continued its rulemaking efforts in anticipation of a resurrection of the Act and has published a new 40 C.F.R. 136 in the Federal Register. The complete text can be found at 49 Fed. Reg. No. 209 p. 2 (26 October 1984) and 50 Fed. Reg. No. 3 p. 690 (4 January 1985) under the heading "Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act; Final Rule, Interim Final Rule, and Proposed Rule."

than if the same mishap or illness were to occur at a remote backcountry lake.

Guidelines for Managers

This paper has described relevant law and directly stated or implied the basic management behavior the law will require of recreation managers who have water quality responsibilities. There is a need, however, to summarize an answer to the appropriate question: What should field managers do?

One of the very important responses to such a question is keep informed. Obtaining and reading publications like this document is one example; another is communicating with professional collegues, support staff, and state agencies who are experienced in water quality issues. Maintaining an interest in pertinent research results from studies conducted by land management agencies and universities is also helpful, as is staying abreast of new laws, regulations, and policies. Being informed means not being surprised.

For in-the-field considerations managers would do well to view public health and safety from a broad perspective, including not just water quality, but all other areas of concern. This will be to the ultimate benefit of the recreation user and the agency. To start with, resource managers should first make preliminary decisions on a site-by-site basis regarding the kind of recreation use they consider appropriate for various areas. If something is occurring in a place where it should not, especially if there is a hazard present, the manager must take action and correct the situation according to agency procedure. If existing agency procedure is inadequate, then the

manager needs to make use of sound professional judgement in addressing the problem.

The requirements for public health and safety management will vary with different locations. If the area of concern is a wilderness--largely inaccessible and with no development--then perhaps the decision should be to do very little. To place adequate warnings (e.g., for giardia and other water quality hazards) at trailheads and in brochures, and to mention any hazards during visitor contact, would likely be sufficient. If, on the other hand, the site is highly developed and accessible, and draws a large number of vacationing families, a more intensive public safety/education program is called for. The gray area between these two alternatives is most likely to generate litigation. If, in an effort to allow more people access to the attractions of nature, the agency puts in trails, erects bridges, designates campsites, establishes swimming holes (or acquiesces in their use), or otherwise makes alterations in the resource, it must then be ready to increase the standard of care which is implied by these improvements.

There are specific risk-reducing steps which managers can take with regard to these mid-level recreation sites. Most are common sense management procedures adhering to professional standards. As mentioned, there is a duty to warn the visitor of potential hazards. Obviously, the manager cannot warn of hazards unless he or she is aware of them. Thus, there should be an appropriate monitoring and inspection schedule for all waters, improvements, and resource alterations. There should also be an identified procedure for handling hazardous conditions. It is not enough to note on an inspection form that the numbers of microbiological indicator organisms